No. 03-583

# In the Supreme Court of the United States

JOSUE LEOCAL, PETITIONER

*v.*

JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENTS


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## QUESTION PRESENTED

Whether driving under the influence and causing serious bodily injury by reason of the operation of the vehicle, in violation of Fla. Stat. Ann. § 316.193(3)(c)(2) (West 2001), is a crime of violence under 18 U.S.C. 16, which renders an alien removable under the immigration laws as an aggravated felon.

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## BRIEF FOR THE RESPONDENTS

### OPINIONS BELOW

The opinion of the court of appeals (J.A. 115-117) is unreported. The opinion of the Board of Immigration Appeals (J.A. 105-108) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on June 30, 2003. The petition for a writ of certiorari was filed on September 29, 2003, and granted on February 23, 2004. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### STATUTORY PROVISIONS INVOLVED

1. Section 16 of Title 18 of the United States Code provides as follows:

The term "crime of violence" means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

2. Section 316.193 of the Florida Statutes Annotated (West 2001) provides, in part, as follows:

(1) A person is guilty of the offense of driving under the influence * * * if the person is driving or in actual physical control of a vehicle within this state and:

(a) The person is under the influence of alcoholic beverages, any chemical substance set forth in s. 877.111, or any substance controlled under chapter 893, when affected to the extent that the person's normal faculties are impaired;

(b) The person has a blood-alcohol level of 0.08 or more grams of alcohol per 100 milliliters of blood; or

(c) The person has a breath-alcohol level of 0.08 or more grams of alcohol per 210 liters of breath.

* * * * *

(3) Any person:

(a) Who is in violation of subsection (1);

(b) Who operates a vehicle; and



(c) Who, by reason of such operation, causes:

* * * * *

2. Serious bodily injury to another, as defined in s. 316.1933, commits a felony of the third degree * * * .

3. Section 316.1933(1)(b) of the Florida Statutes Annotated (West Supp. 2004) provides as follows: "The term 'serious bodily injury' means an injury to any person, including the driver, which consists of a physical condition that creates a substantial risk of death, serious personal disfigurement, or protracted loss or impairment of the function of any bodily member or organ."

**STATEMENT**

1. Under Section 237(a) of the Immigration and Nationality Act, 8 U.S.C. 1227(a) (2000 & Supp. I 2001), several classes of aliens are subject to removal, including those who have been convicted of an "aggravated felony" at any time after admission to the United States. 8 U.S.C. 1227(a)(2)(A)(iii). Many offenses satisfy the definition of "aggravated felony," including "a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(F). Section 16 of Title 18 in turn defines "crime of violence" as (a) "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another" or (b) "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

2. Petitioner is a native and citizen of Haiti. In 1980, he was paroled into the United States. In 1987, he became a lawful permanent resident. J.A. 84; A.R. 298.

On January 7, 2000, at 1:25 a.m., petitioner drove through a flashing red light at an intersection in Miami-Dade County, Florida, and struck another car. The driver of the car petitioner struck was pinned behind the steering wheel and had to be extracted by rescue workers before being taken to a hospital for treatment. A passenger in the car was treated for minor injuries at the scene. J.A. 25-29, 92.

The police officers who responded to the scene smelled alcohol on petitioner's breath and observed a half-empty bottle of whiskey on the floor of his car. Petitioner admitted that he had been drinking, but was unaware of what had happened; he told the officers that he was tired and wanted to go to sleep. When one of the officers attempted to give petitioner a sobriety test, petitioner shoved him in the chest. He then pushed the officers away when they attempted to arrest him. The officers ultimately succeeded in placing petitioner under arrest and transported him to a hospital ward, where blood was forcibly drawn. The blood test confirmed that petitioner was intoxicated. J.A. 29-31, 92-93.

Petitioner was charged by the Florida State Attorney with two counts of driving under the influence and causing serious bodily injury by reason of the operation of the vehicle, in violation of Fla. Stat. Ann. § 316.193(3)(c)(2) (West 2001).[1] He was also

[1] The current version of the Florida statute differs from the version in effect at the time of petitioner's crime, in that the current version describes the offense as driving under the influence and causing "or contribut[ing] to causing" serious bodily injury



charged with battery against a law-enforcement officer and resisting arrest. He pleaded guilty to the first two counts and was sentenced to two and a half years in prison. J.A. 1-21, 33-38.

3. In November 2000, in light of his Florida conviction, the Immigration and Naturalization Service (INS) initiated removal proceedings against petitioner.[2] The basis for the charge of removability was that a conviction under Section 316.193(3)(c)(2) constitutes a "crime of violence," and that petitioner had therefore been convicted of an "aggravated felony." An immigration judge (IJ) found petitioner removable, declined to grant relief from removal, and ordered him removed to Haiti. J.A. 83-103.

4. After initially affirming the IJ's decision without opinion, J.A. 104, the Board of Immigration Appeals (BIA) vacated its decision, reopened the removal proceedings, and then issued an opinion dismissing petitioner's appeal, J.A. 105-108. Relying on *Le* v. *United States Attorney General*, 196 F.3d 1352 (11th Cir. 1999) (per curiam), which held that the Florida offense of which petitioner was convicted is a crime of violence under 18 U.S.C. 16(a), the BIA affirmed the IJ's conclusion that petitioner was an aggravated felon and thus removable. J.A. 106-107. The BIA considered itself bound by *Le* because of its "obligation to defer to circuit court interpretations of provisions of federal criminal law," J.A. 107, and because petitioner's re-

by reason of the operation of the vehicle. Fla. Stat. Ann. § 316.193(3)(c)(2) (West 2001 & Supp. 2004).

[2] On March 1, 2003, the INS's immigration-enforcement functions were transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, Tit. II, § 441, 116 Stat. 2192 (to be codified at 6 U.S.C. 251).

moval proceedings arose in the Eleventh Circuit, J.A. 106. The BIA also affirmed the IJ's conclusion that petitioner was not entitled to relief from removal. J.A. 107-108.

5. The court of appeals dismissed petitioner's petition for review. J.A. 115-117. The court observed that, under 8 U.S.C. 1252(a)(2)(C), which deprives courts of jurisdiction to review an order of removal against an alien removable by reason of having committed certain offenses (including an aggravated felony), it had jurisdiction only to determine whether petitioner was an alien who is removable based on a conviction for such an offense. J.A. 116. Since petitioner did not dispute that he was an alien, the court turned to the question whether his conviction rendered him removable as an aggravated felon. *Ibid.* Relying on its decision in *Le*, which "squarely held" that a conviction under Fla. Stat. Ann. § 316.193(3)(c)(2) is a "crime of violence" under 18 U.S.C. 16, the court concluded that petitioner was removable as an aggravated felon. J.A. 117. In reaching that conclusion, the court rejected petitioner's contention that *Le* had merely deferred to a BIA interpretation of 18 U.S.C. 16 that has since been abandoned. J.A. 117. The court explained that *Le* had "made a binding, *de novo* determination that a DUI that causes serious bodily injury to another is a crime of violence." *Ibid.* (citing *Le*, 196 F.3d at 1354).[3]

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[3] In November 2002, after the BIA dismissed petitioner's appeal but before the court of appeals dismissed his petition for review, the INS removed petitioner to Haiti. An alien's removal does not preclude any direct judicial review to which he is otherwise entitled. See, *e.g.*, *Moore* v. *Ashcroft*, 251 F.3d 919, 922 (11th Cir. 2001).



## SUMMARY OF ARGUMENT

The Florida offense of which petitioner was convicted—driving under the influence and causing serious bodily injury by reason of the operation of the vehicle—is a crime of violence under 18 U.S.C. 16.

I. The Florida offense is a crime of violence under Section 16(a), because it "has as an element the use * * * of physical force against the person or property of another." Contrary to petitioner's contentions, the "use" of physical force need not be intentional, and causing serious bodily injury by the operation of a vehicle necessarily entails the use of "physical force" against a person.

A. Section 16(a) does not mention intent, and the word "use," standing alone, does not require it. While dictionaries define "use" as the employment of something for an end or purpose, they also include definitions that do not have a volitional element. Whether "use" requires intent depends on the thing that is being used, and since physical force can be applied either intentionally or accidentally, the term "use" in Section 16(a) does not have a *mens rea* component. *Smith* v. *United States*, 508 U.S. 223 (1993), and *Bailey* v. *United States*, 516 U.S. 137 (1995), do not require a different result. Those cases held that the "use" of a firearm must be active (as opposed to passive); they did not address the question whether the "use" of force must be intentional (as opposed to accidental).

There is no merit to petitioner's contention that the "accidental use of force" is a nonsensical concept, since that very phrase has been used by the courts of at least one state to describe a defense to a crime, see *People* v. *Walls*, 586 N.E.2d 792, 797 (Ill. App. Ct. 1992); *People* v. *Shelton*, 489 N.E.2d 879, 883 (Ill. App. Ct. 1986), and the

legislature of another State has defined "physical abuse" as the "non-accidental use of force" resulting in injury, see N.Y. Soc. Serv. Law § 473(6)(a) (McKinney 2003). The fact that Congress often modifies the verb "use" with "intentionally" or "willfully" is further evidence that the word, by itself, does not encompass any particular mental state. Nor would it be proper to infer an intent requirement on the theory that strict-liability offenses are disfavored, since 18 U.S.C. 16 merely classifies crimes that have been defined elsewhere. In any event, the Florida offense is not a "classic strict liability" crime, inasmuch as drunk driving inherently "involves culpability." *Baker* v. *State*, 377 So.2d 17, 20 (Fla. 1979). Finally, the presence of the terms "attempted use" and "threatened use" in 18 U.S.C. 16(a) does not assist petitioner, since the fact that an attempt or threat requires intent does not mean that the same is true of the object of the attempt or threat. See, *e.g.*, *Braxton* v. *United States*, 500 U.S. 344, 351 n.* (1991).

B. Every violation of the Florida statute entails the use of "physical force." That is obviously true of a typical violation, like petitioner's, where a drunk driver crashes his vehicle into another vehicle or person. It is also true of the atypical violations described by petitioner. A drunk driver uses physical force against the person of another if he swerves and thereby causes a pedestrian (or another driver) to jump (or swerve) out of the way to avoid being struck, and he uses physical force against the person of another if he stops his car on a highway and thereby causes an unsuspecting driver to collide with it.

II. The Florida offense is also a crime of violence under Section 16(b), because it "is a felony * * * that, by its nature, involves a substantial risk that physical force against the person or property of another may be



used in the course of committing the offense." Even if, as petitioner contends, a drunk driver does not use physical force unless he collides with another vehicle or person, and even if, as a consequence, physical force is not an element of the Florida offense, any person who not only drives drunk but also swerves off the road or stops his car on the highway manifestly is driving in a way that creates a substantial risk of such a collision. The only possible objection to the view that the Florida offense is a crime of violence under Section 16(b)—that the requisite "use" of force must be intentional—fails for the same reasons that the "use" of force required by Section 16(a) need not be intentional. If it does not affirm the court of appeals' Section 16(a) holding, this Court can and should decide that the Florida offense is a crime of violence under Section 16(b) even though the court of appeals did not reach the issue, because the issue is included within the question presented, it is a valid basis for affirming the judgment, and it has divided the lower courts.

III. Petitioner's interpretation of Section 16 finds no support in 8 U.S.C. 1101(h), which defines "serious criminal offense" as (1) any felony, (2) any crime of violence (as defined in 18 U.S.C. 16), or (3) any reckless- or drunk-driving crime "if such crime involves personal injury to another." As an initial matter, the views of the Congress that enacted 8 U.S.C. 1101(h) (the 101st) are a "hazardous basis," *e.g.*, *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 355 (1998), for inferring the intent of the Congress that enacted 18 U.S.C. 16 (the 98th). In any event, interpreting "crime of violence" to include the statutory offense of drunk driving resulting in injury does not, as petitioner contends, render Section 1101(h)(3) superfluous. A person who causes an injury while committing the simple misdemeanor

offense of driving under the influence has committed a "serious criminal offense" under Section 1101(h)(3) but not under Section 1101(h)(2). Finally, the 101st Congress might have enacted Section 1101(h)(3) simply to ensure that drunk driving involving injury was covered no matter how courts ultimately interpreted Section 16.

## ARGUMENT

### DRIVING UNDER THE INFLUENCE AND CAUSING SERIOUS BODILY INJURY BY REASON OF THE OPERATION OF THE VEHICLE, IN VIOLATION OF FLA. STAT. ANN. § 316.193(3)(c)(2), IS A CRIME OF VIOLENCE UNDER 18 U.S.C. 16

Under Fla. Stat. Ann. § 316.193(3)(c)(2), it is a third-degree felony for a person to drive under the influence and cause serious bodily injury by reason of the operation of the vehicle. This offense is a "crime of violence" under each of the alternative definitions of that "broadly defined" term, *INS* v. *St. Cyr*, 533 U.S. 289, 296 n.4 (2001), in 18 U.S.C. 16.[4]

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[4] At least 40 other States have enacted statutes that criminalize drunk driving resulting in injury. See Ala. Code § 13A-6-20(a)(5) (1994); Cal. Veh. Code § 23153 (West 2000); Colo. Rev. Stat. Ann. § 18-3-205(1)(b)(I) (West 2003); Conn. Gen. Stat. Ann. § 53a-60d(a) (West 2001); Del. Code Ann. tit. 11, §§ 628(2), 629 (1995); Ga. Code Ann. § 40-6-394 (2001); Idaho Code § 18-8006(1) (2004); 625 Ill. Comp. Stat. Ann. 5/11-501(d)(1)(C) (West 2002); Ind. Code Ann. § 9-30-5-4(a) (Michie 1997 & Supp. 2003); Iowa Code Ann. § 707.6A(4) (West 2003); Ky. Rev. Stat. Ann. § 189A.010(1) and (11)(c) (Michie 1997 & Supp. 2003); La. Rev. Stat. Ann. §§ 14:39.1(A), 14:39.2(A) (West 1997 & Supp. 2004); Me. Rev. Stat. Ann. tit. 29-A, § 2411(1-A)(D)(1) (West 1996 & Supp. 2003); Md. Code Ann., Crim. Law § 3-211(c) and (d) (West 2002 & Supp. 2003); Mass. Ann. Laws ch. 90, § 24L(1) (Law. Co-op. 1994 & Supp. 2004); Mich. Comp. Laws Ann. § 257.625(5) (West 2001 & Supp. 2004); Miss. Code Ann. § 63-11-30(5) (1999 & Supp. 2003); Mo. Ann. Stat. § 565.060(1)(4) (West 1999); Mont. Code Ann. § 45-5-205(1) (2003); Neb. Rev. Stat. Ann. § 60-6,198(1) (Michie 2002); Nev. Rev. Stat. Ann. § 484.3795(1) (Michie 2003 & Supp. 2003); N.H. Rev. Stat. Ann. § 265:82-a(I)(b) and (II)(b) (2001 & Supp. 2003); N.J. Stat. Ann. § 2C:12-1(c) (West 1995 & Supp. 2004); N.M. Stat. Ann. § 66-8-101(B) (Michie 1998 & Supp. 2002); N.D. Cent. Code § 39-08-01.2(1)(b) and (c) (1987); Ohio Rev. Code Ann. § 2903.08(A)(1)(a) (Anderson 2003); Okla. Stat. Ann. tit. 47, § 11-904(B)(1) (West 2000); 75 Pa. Cons. Stat. Ann. § 3804(b) (West 1996 & Supp. 2004); R.I. Gen. Laws § 31-27-2.6(a) (2002); S.C. Code Ann. § 56-5-2945(A)(1) (Law. Co-op. 1991 & Supp. 2003); S.D. Codified Laws § 22-16-42 (Michie 1998 & Supp. 2003); Tenn. Code Ann. § 39-13-106(a) (2003); Tex. Penal Code Ann. § 49.07(a)(1) (Vernon 2003); Utah Code Ann. § 41-6-44(3)(a)(ii)(A) and (3)(b) (1998 & Supp. 2003); Vt. Stat. Ann. tit. 23, § 1210(f) (1999 & Supp. 2003); Va. Code Ann. § 18.2-51.4(A) (Michie Supp. 2003); Wash. Rev. Code Ann. § 46.61.522(1)(b) (West 2001 & Supp. 2004); W. Va. Code Ann. § 17C-5-2(c) (Michie 2000 & Supp. 2004); Wis. Stat. Ann. § 940.25(1) (West 1996 & Supp. 2002); Wyo. Stat. Ann. § 31-5-233(h) (Michie 2003).



### I. PETITIONER'S VIOLATION OF FLA. STAT. ANN. § 316.193(3)(c)(2) IS A CRIME OF VIOLENCE UNDER 18 U.S.C. 16(a)

*Le* v. *United States Attorney General*, 196 F.3d 1352 (11th Cir. 1999) (per curiam), on which the court below relied, held that the Florida offense at issue here is a crime of violence under 18 U.S.C. 16(a). See 196 F.3d at 1354. Section 16(a) defines "crime of violence" as "an offense that has as an element [1] the use, attempted use, or threatened use [2] of physical force against the person or property of another." An "element" of an offense is "a fact that must be proven beyond a reasonable doubt to obtain a conviction." *Chrzanoski* v. *Ashcroft*, 327 F.3d 188, 192 (2d Cir. 2003). *Le* correctly held that drunk driving resulting in serious bodily

injury requires proof of the use of physical force against a person.

Petitioner offers two independent reasons why the use of physical force is not a fact that must be proved in order for a defendant to be found guilty of violating Fla. Stat. Ann. § 316.193(3)(c)(2). First, he contends that the "use" of physical force means the intentional use of physical force, and under the Florida statute, a person can cause serious bodily injury unintentionally. Pet. Br. 11-23; accord NACDL Br. 14-20. Second, he contends that, regardless of whether "use" requires intent, a person can cause serious bodily injury under the Florida statute without using "physical force." Pet. Br. 24-34; accord NACDL Br. 8-14. Neither contention has merit.

**A. Under 18 U.S.C. 16(a), The "Use" Of Physical Force Need Not Be Intentional**

In arguing that an offense is not a crime of violence under Section 16(a) unless the "use" of physical force is intentional, petitioner faces a significant obstacle: "the language of the statute does not state that * * * [the] use of physical force must be intentional." *Omar* v. *INS*, 298 F.3d 710, 715 (8th Cir. 2002). Indeed, not only does the text of Section 16(a) "not mention intent," *United States* v. *Rutherford*, 54 F.3d 370, 378 (7th Cir.) (Easterbrook, J., concurring) (interpreting similarly worded Sentencing Guideline), cert. denied, 516 U.S. 924 (1995); it contains "no mens rea language" at all, *United States* v. *Vargas-Duran*, 356 F.3d 598, 611 (5th Cir.) (en banc) (E. Garza, J., dissenting) (interpreting another similarly worded Sentencing Guideline), cert. denied, 124 S. Ct. 1728 (2004), and pet. for cert. pending, No. 03-1514 (filed May 7, 2004). Attempting to overcome the absence of any such qualification in the



statute, petitioner relies on text and context. He contends that the word "use," by definition, "includes intent," Pet. Br. 13; and he contends that the word "use" in Section 16(a) must include intent, because "the adjacent statutory terms, 'attempted use' and 'threatened use,' both * * * are intentional acts," *id.* at 15. There is no merit to either contention. Someone who drunkenly (though unintentionally) crashes his car into another has "used" physical force against his victim.

***1. The word "use" does not have a mens rea component***

a. In support of his contention that intent is inherent in the term "use," petitioner relies on dictionaries that define the word to mean the employment of a thing for a purpose or to achieve an end. Pet. Br. 13-14 & n.3. "Having a 'purpose' or attaining 'an end,'" petitioner says, "entails having an intent to accomplish something; not something done accidentally or unintentionally." *Id.* at 14. But while the dictionaries on which petitioner principally relies, see *id.* at 13, arguably suggest that "'use' * * * more often refer[s] to the intentional, rather than the accidental, use of force," each dictionary indicates, "without question, [that] force may be used accidentally." *United States* v. *Chapa-Garza*, 262 F.3d 479, 482 (5th Cir. 2001) (Barksdale, J., dissenting from denial of rehearing en banc). One of those dictionaries defines "use," in part, as "to put into action or service, *especially* to attain an end," *Black's Law Dictionary* 1382 (5th ed. 1979) (emphasis added), and the other sums up the multiple definitions of the word by stating that "USE is general and indicates any putting to service of a thing, *usu[ally]* for an intended or fit purpose," *Webster's Third New International Diction-*

*ary* 2524 (1981) (emphasis added). These definitions "suggest[], of course, that a purpose is not always intended." *Chapa-Garza*, 262 F.3d at 482 n.2 (Barksdale, J., dissenting).[5]

Petitioner's amici cite a definition from another dictionary—the Oxford English Dictionary (OED)—that is similar to the definitions on which petitioner relies. NACDL Br. 15. But as Judge Easterbrook has observed, that dictionary "includes dozens of definitions of 'use' that do not suggest any mental ingredient." *United States* v. *Rutherford*, 54 F.3d at 378 n.† (concurring opinion). For example, while petitioner's amici would presumably have the Court adopt the OED's seventh definition of the verb "use" ("to employ for a certain end or purpose"), its sixth definition ("[t]o put into practice or operation; to carry into action or effect") does not suggest any volitional component. 11 *Oxford English Dictionary* 471 (1978). *Webster's* is similar. While its third definition of the verb is "to carry out a purpose or action by means of" (something that is necessarily done intentionally), its second definition is "to put into action or service" (something that does not require intent). *Webster's Third New International Dictionary*, *supra*, at 2523-2524.

Indeed, one could reasonably infer from the dictionaries on which petitioner relies that the employment of something for a purpose is not even the *primary* definition of "use," much less the sole one. Section 16(a) employs "use" as a noun, and the first of the several

[5] The dictionaries we cite are the editions that were current in 1984, the year of Section 16's enactment. As far as we are aware, there are no material differences between the definitions of "use" found in these editions and the definitions found in the later editions cited by petitioner and his amici.



definitions of the noun in both *Webster's* and *Black's* includes "application," *Webster's Third New International Dictionary*, *supra*, at 2523; *Black's Law Dictionary*, *supra*, at 1382, an action that can be carried out unintentionally, as the choice of language in petitioner's own brief confirms.[6] "Application" is also a word that can be comfortably substituted for the word "use" in 18 U.S.C. 16(a).

Because "a word is known by the company it keeps," *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995), the correct definition of "use" in a particular context is likely to depend on the thing that is being used. The narrower definition of "use" might therefore be applicable if the Court were interpreting, say, a statute that defined "crime of deception" as an offense that has as an element "the use of fraud," because someone who employs fraud is necessarily acting purposefully. But since "physical force" can be applied either intentionally

[6] See, *e.g.*, Pet. Br. 7 ("use" does not encompass "the accidental, unintentional or even negligent applications of force"); *id.* at 12 (under Florida statute, "the unintentional, negligent and/or accidental application of force" is sufficient); *id.* at 14 ("[a]ccidental, negligent or unintentional applications of force" do not satisfy definition of "use"); *id.* at 16 ("The plain meaning of § 16(a) establishes that a crime of violence requires more than the accidental or negligent application of force against another."); *id.* at 18 ("[t]he mere application of force against the person of another does not necessarily mean that the application was intentional"); *id.* at 19 (both subsections of Section 16 contain language critical to determining whether "offenses that involve the unintentional or accidental application of force against another" are "crimes of violence"); *id.* at 23 ("An unintentional or accidental application of force does not suffice for a crime of violence."); *id.* at 24 (Florida offense "do[es] not have as an element the application of any force (accidentally, negligently, intentionally or otherwise) against the person of another").

or accidentally, there is no basis for limiting "use" to intentional conduct in Section 16(a)'s definition of "crime of violence."

b. In addition to relying on dictionary definitions of "use," petitioner relies on *Smith* v. *United States*, 508 U.S. 223 (1993), and *Bailey* v. *United States*, 516 U.S. 137 (1995). Pet. Br. 14-15. In both cases, this Court interpreted the word "use" in 18 U.S.C. 924(c)(1), which criminalizes the use or carrying of a firearm during and in relation to certain types of crimes, including drug-trafficking crimes. In neither case, however, did the Court address the question whether a gun (or anything else) could be "used" unintentionally.

*Smith* involved a narrow issue: whether the exchange of a gun for drugs constitutes a "use" of the gun. The Court held that it does, but because such an exchange is necessarily made intentionally, the Court had no occasion to consider whether the "use" of a gun requires intent. *Smith* does say that, under Section 924(c)(1), the "presence or involvement" of a firearm "cannot be the result of accident or coincidence." 508 U.S. at 238. But that conclusion was based on the statutory requirement that the firearm be used "in relation to" a drug-trafficking crime, not on the requirement that it be "used." *Id.* at 237-239.

*Bailey* involved a broader issue: whether evidence of the proximity and accessibility of a firearm is sufficient to support a conviction for "use" of the firearm under Section 924(c)(1). The Court answered that question no, on the ground that the proximity-and-accessibility standard effectively equates use with possession. To avoid that result, the Court held that Section 924(c)(1) "requires evidence sufficient to show an *active employment* of the firearm by the defendant." 516 U.S. at 143. But in *Bailey*, as in *Smith*, the Court had no occasion to



consider whether the "use" of a gun requires intent. *Bailey* addressed the question whether "use" of a gun must be active (rather than passive), not whether it must be intentional (rather than inadvertent), and nothing in the Court's opinion is inconsistent with the view that a gun can be actively, though unintentionally, "used." Indeed, the Court observed in *Bailey* that "[t]he active-employment understanding of 'use'" includes, "most obviously," the firing of a gun, *id.* at 148, and as Judge Easterbrook has noted, "a gun may be discharged accidentally, and thus 'used,' in the same sense that a drunk driver may mow down a pedestrian without intending injury," *Rutherford*, 54 F.3d at 379 (concurring opinion).[7]

c. In arguing that "use" requires intentional conduct, petitioner says that "it would not make sense to 'use' something unintentionally or accidentally." Pet. Br. 14. Petitioner's amici go further. According to them, it would be "torturous" to apply the term to "accidental human conduct." NACDL Br. 16. Petitioner and his amici are mistaken. While there are some things that, by their nature, cannot be "accidentally used" (a plan, for example, or a trick), one can speak of the "accidental use" of many things without doing violence to ordinary English usage.

For example, there is nothing nonsensical, much less torturous, about referring to the "inadvertent use" of a particular word or phrase, as this Court's opinions

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[7] In *Jones* v. *United States*, 529 U.S. 848 (2000), which addressed the meaning of the "use" of property in commerce or commerce-affecting activity under the federal arson statute, 18 U.S.C. 844(i), the Court cited *Bailey* for the proposition that "use" ordinarily means "active employment." 529 U.S. at 855. As in *Smith* and *Bailey*, the Court in *Jones* had no occasion to consider whether "use" in that context requires intent.

demonstrate.[8] It is equally proper to refer to the "accidental use" of a weapon, as Congress has done.[9] One can also speak of the "accidental use of force." Indeed, Illinois courts have described the "accidental use of force" as a defense to a crime of violence, in holding that a defendant cannot simultaneously rely on that defense and the defense of self-defense, the latter of which "relates to the intentional or knowing use of force." *People* v. *Walls*, 586 N.E.2d 792, 797 (Ill. App. Ct. 1992) (quoting *People* v. *Purrazzo*, 420 N.E.2d 461, 467 (Ill. App. Ct. 1981), cert. denied, 455 U.S. 948 (1982)); *People* v. *Shelton*, 489 N.E.2d 879, 883 (Ill. App. Ct. 1986) (same). And the New York Legislature has defined "physical abuse" in the Social Services Law as "the non-accidental use of force" that results in injury, pain, or impairment, a definition that obviously presumes that force can be used accidentally. N.Y. Soc. Serv. Law § 473(6)(a) (McKinney 2003).

Nor does "use" *presumptively* mean intentional use, such that a qualifier is necessary only when Congress

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[8] See, *e.g.*, *Illinois Cent. R.R.* v. *Norfolk & Western Ry.*, 385 U.S. 57, 66 (1966) (lower court "inadvertently used" certain terminology in its opinion); *Magenau* v. *Aetna Freight Lines, Inc.*, 360 U.S. 273, 277 (1959) (referring to apparently "inadvertent use" of certain words in interrogatory submitted to jury); *Unexcelled Chem. Corp.* v. *United States*, 345 U.S. 59, 64 (1953) ("when Congress, though perhaps mistakenly or inadvertently, has used language which plainly brings a subject matter into a statute, its word is final").

[9] See Act of Nov. 26, 1991, Pub. L. No. 102-172, § 8132(c)(7), 105 Stat. 1209 (establishing commission to make recommendations concerning safeguards against threat of "accidental or unauthorized use" of nuclear weapons); National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 1441(a)(3), 104 Stat. 1690 (finding heightened concern regarding possible "accidental use" of Soviet nuclear weapons).



means something different. To the contrary, the United States Code is replete with statutes in which the verb "use" is modified by the adverb "intentionally" or "willfully."[10] Indeed, the same Act that added Section 16 to Title 18 added Section 1117(b) to Title 15, the latter of which allows treble damages for "intentionally using" a counterfeit trademark. Compare Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit.

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[10] See, *e.g.*, 8 U.S.C. 1367(c) ("willfully uses" information from alien who was battered or subjected to extreme cruelty); 12 U.S.C. 1715z-19 ("willfully uses" income from certain property for other than authorized purpose); 18 U.S.C. 708 ("willfully uses" coat of arms of Swiss Confederation); 18 U.S.C. 1385 ("willfully uses" part of Army or Air Force as posse comitatus); 18 U.S.C. 1543 ("willfully and knowingly uses" false passport); 18 U.S.C. 1735(a)(1) ("willfully uses" mails to deliver sexually oriented advertisements); 18 U.S.C. 2511(1)(b) ("intentionally uses" device to intercept oral communications); 18 U.S.C. 2511(1)(d) ("intentionally uses" intercepted communication); 21 U.S.C. 841(b)(6) ("intentionally uses" poison, chemical, or other hazardous substance); 21 U.S.C. 843(b) ("knowingly or intentionally to use" communication facility to commit drug crime); 26 U.S.C. 148(a) (bond is arbitrage bond if issuer "intentionally uses" portion of proceeds of issue of which bond is part in specified manner); 26 U.S.C. 9012(c)(1) ("knowingly and willfully to use" certain payments to candidates for other than specified purposes); 31 U.S.C. 1349(b) ("willfully uses" car or plane owned or leased by government for other than official purpose); 38 U.S.C. 5701(f) ("willfully uses" name or address of present or former member of Armed Forces for other than specified purposes); 42 U.S.C. 2188 ("intentionally used" patent in violation of antitrust laws); 47 U.S.C. 312a ("willfully used" radio license to distribute drugs); 47 U.S.C. 702(3) (communications satellite is earth satellite "intentionally used" to relay telecommunication information); Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, Tit. VI, § 601, 117 Stat. 686 (to be codified at 18 U.S.C. 25(b)) ("intentionally uses" minor to commit crime of violence).

II, § 1001(a), 98 Stat. 2136 with § 1503(2), 98 Stat. 2182. That Congress has occasionally used the phrase "accidental use" and has often used the phrases "intentional use" and "willful use" demonstrates that "use," like most verbs, does not encompass any particular mental state, and that (unless the context indicates otherwise) a mental state must be specified if the speaker wishes to narrow the conduct at issue. There is no such specification in 18 U.S.C. 16.

d. There may be statutes in which Congress has criminalized the "use" of a thing without including a *mens rea* element, and as to which courts would nevertheless infer such an element, on the theory that strict-liability offenses are disfavored. See *Staples* v. *United States*, 511 U.S. 600, 606 (1994). That principle does not apply here, because 18 U.S.C. 16 does not define a crime; it merely classifies crimes that have been defined elsewhere.[11] While there is a basis for the presumption

[11] Classifying an offense as a "crime of violence" under Section 16 has a number of consequences beyond the immigration context. For example, Congress has criminalized certain conduct undertaken in the course of committing a crime of violence, see 15 U.S.C. 1245(b) (possession or use of ballistic knife); PROTECT Act, Pub. L. No. 108-21, Tit. VI, § 601, 117 Stat. 686 (to be codified at 18 U.S.C. 25(b)) (use of minor); it has criminalized certain conduct undertaken by someone who has been convicted of a crime of violence, see James Guelff and Chris McCurley Body Armor Act of 2002, Pub. L. No. 107-273, Div. C, Tit. I, § 11009(e)(2)(A), 116 Stat. 1821 (to be codified at 18 U.S.C. 931(a)) (possession of body armor); and it has criminalized certain conduct that has as an element the commission, attempted commission, or intended commission of a crime of violence, see 18 U.S.C. 521(c)(2) (criminal street gangs); 18 U.S.C. 842(p) (distribution of information relating to explosives, destructive devices, and weapons of mass destruction); 18 U.S.C. 1952(a) (travel in aid of racketeering); 18 U.S.C. 1956(a) (money laundering); 18 U.S.C. 1959(a) (violent crime in aid of racketeering); 18 U.S.C. 2261(a) (interstate domestic violence); 21 U.S.C. 841(b)(7)(A) (distribution of controlled substance). The classification of an offense as a crime of violence under Section 16 also has consequences for, among other things, pre-trial detention, 18 U.S.C. 3142(f) and (g); extradition, 18 U.S.C. 3181(b); witness relocation and protection, 18 U.S.C. 3521(a)(1) and (b)(1)(G); sentencing, see 18 U.S.C. 3561(b) (domestic-violence offender); 18 U.S.C. 3663A(c) (mandatory restitution); 28 U.S.C. 994(h) (career offender); juvenile-delinquency proceedings, 18 U.S.C. 5032, 5038(d) and (f); the arrest authority of the Capitol Police, 40 U.S.C. 212a, 212a-3(a) (2000 & Supp. I 2001) (to be recodified at 2 U.S.C. 1961(a) and 1967(a)); and the collection of DNA samples from prisoners and persons on probation, supervised release, or parole, 42 U.S.C. 14135a.



that Congress does not intend to criminalize conduct undertaken without a culpable mental state, there is no reason to suppose that Congress intended to exclude from the definition of "crime of violence" conduct of that type that has already been criminalized.

In any event, petitioner's offense—driving under the influence and causing injury by the operation of the vehicle—is not a typical strict-liability crime. While a Florida prosecutor need not prove any particular mental state beyond the defendant's intoxication, the offense is viewed by Florida as inherently involving negligence, at the very least. As the Supreme Court of Florida explained in a case involving a violation of another provision of the statute at issue here—driving under the influence and causing *death* by the operation of the vehicle, Fla. Stat. Ann. § 316.193(3)(c)(3)—the Florida Legislature long ago determined that "it is criminal negligence for a person in an intoxicated condition to attempt to drive" and that, "if death results to any person while so doing, *such initial negligence will be imputed to the act itself.*" *State* v. *Hubbard*, 751 So.2d 552, 555 (1999) (quoting *Cannon* v. *State*, 107 So.

360, 362 (Fla. 1926); emphasis added by court). Likewise, in a case involving Section 316.193(3)(c)(3)'s predecessor, Fla. Stat. Ann. § 860.01(2) (West 1977) (repealed 1986), the Supreme Court of Florida observed that the offense is not a "classic strict liability" crime, because "the act of operating a motor vehicle while intoxicated involves culpability"—indeed, culpability amounting not merely to negligence but to "reckless[ñess]." *Baker* v. *State*, 377 So.2d 17, 20 (1979). Thus, even if 18 U.S.C. 16 excluded strict-liability crimes, drunk driving resulting in injury would still be a crime of violence.

***2. The fact that "attempted use" and "threatened use" require intent does not mean that "use" does***

Under 18 U.S.C. 16(a), an offense is a crime of violence if it has as an element "the use, attempted use, or threatened use" of physical force against the person or property of another. In addition to arguing that the word "use," by definition, requires intent, petitioner contends that, because "attempted use" and "threatened use" require intent, "use" should be interpreted to require the same *mens rea*. Pet. Br. 15; accord NACDL Br. 17 & n.4. Petitioner is mistaken.

The fact that an attempt or threat requires intent does not mean that the *object* of the attempt or threat can only be done intentionally. That is perhaps most obviously the case when the object is murder. As this Court has explained, "a murder may be committed without an intent to kill," even though "an attempt to commit murder requires a specific intent to kill." *Braxton* v. *United States*, 500 U.S. 344, 351 n.* (1991) (quoting 4 Charles E. Torcia, *Wharton's Criminal Law* § 473, at 572 (14th ed. 1981)). If the "attempted use" and "threatened use" of force require intent, therefore,



it is because of the nature of an "attempt" and a "threat" (which ordinarily cannot be unintentional), not because of the nature of "use" (which ordinarily can). As a matter of policy, moreover, requiring specific intent for an attempt or threat but not for the underlying crime can be justified on the ground that an attempt or threat does not require that the underlying crime be completed.

Under petitioner's view, the phrase "murder or attempted murder," cf. 18 U.S.C. 1114 ("kills or attempts to kill"), would mean "*intentional* murder or attempted murder," because attempted murder requires an intent to kill and that requirement would be read into the term "murder," thus excluding felony murder and any other form of murder that does not require an intent to kill. That interpretation is self-evidently incorrect. And petitioner's interpretation of Section 16(a) is equally incorrect.[12]

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[12] In support of the theory that 18 U.S.C. 16 requires intent, petitioner's amici make a number of arguments based on legislative history. Each is without merit. Contrary to their assertion (NACDL Br. 19), for example, a statement in a House Report on the meaning of the term "physical action" in a bill that never became law, see H.R. Rep. No. 1396, 96th Cong., 2d Sess. 14 (1980), has no bearing on the meaning of the word "use" in 18 U.S.C. 16. And regardless of whether the offenses in the definition of "crime of violence" in the District of Columbia Court Reform and Criminal Procedure Act of 1970 (DC-CRCPA), Pub. L. No. 91-358, § 210, 84 Stat. 650, "require[] intent," as amici contend (NACDL Br. 19), that definition did not serve as the "model[]" for 18 U.S.C. 16, as another amicus contends (MIHRC Br. 6), since Section 16 consists of general definitions without mentioning any specific offenses, while the DC-CRCPA lists specific offenses without providing any general definition. Nor, contrary to amici's contention (NACDL Br. 18), is there any statement in the legislative history that offenses constituting "crimes of violence" in Section 16 are

### B. The Offense Of Drunk Driving Resulting In Injury Necessarily Entails The Use Of "Physical Force" Against A Person

Petitioner's next contention is that, even if 18 U.S.C. 16(a) does not require that the "use" of force be intentional, the offense of which he was convicted still is not a crime of violence under Section 16(a), because "physical force" is not an element of the offense. Petitioner recognizes that "a typical DUI with injury," like petitioner's offense, involves "an intoxicated driver whose vehicle hits another vehicle" or a pedestrian, and that such a "typical" case necessarily entails the application of physical force. Pet. Br. 28. He argues, however, that there are "plausible situations" in which "physical injury is caused by the operation of a vehicle by an intoxicated driver[] without the use of any physical force," *ibid.*, and that, in the words of his amici, "the statute can [therefore] be violated without any 'use of force,'" NACDL Br. 13. Petitioner is mistaken. When a drunk driver causes serious bodily injury with his vehicle, he has necessarily used physical force. "[O]perat[ing] a vehicle[] and * * * by reason of such operation[] caus[ing] * * * [s]erious bodily injury to another," Fla. Stat. Ann. § 316.193(3)(c)(2), thus constitutes "the use * * * of physical force against the person or property of another," 18 U.S.C. 16(a).[13]

Petitioner and his amici provide two basic examples of a case in which (according to them) a person can violate the Florida statute without using physical force. The first situation is one in which a drunk driver swerves; a pedestrian, or another vehicle, moves out of the way to avoid being hit; in so doing, the pedestrian falls down (or suffers a heart attack), or the other vehicle crashes (though not into the defendant's car); and the victim suffers serious bodily injury as a result. Pet. Br. 28; NACDL Br. 13-14. In that situation, according to petitioner and his amici, there has been no physical force because the drunk driver's car did not touch the victim. Pet. Br. 28; NACDL Br. 13. The second situation is one in which the drunk driver stops his car in a place where it should not be stopped—on a highway, for example—and the victim suffers serious

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"essentially the same" as the "crimes of violence" listed in the DC-CRCPA. Instead, the Senate Report on which amici rely says that the offenses set forth in a statutory provision that governs detention hearings, 18 U.S.C. 3142(f)(1)—namely, "crimes of violence, offenses punishable by life imprisonment or death, [and] offenses for which a maximum 10-year imprisonment is prescribed in [certain controlled-substances laws]"—are, collectively, "essentially the same categories of offenses" described in the DC-CRCPA by the terms "dangerous crime" and "crime of violence." S. Rep. No. 225, 98th Cong., 1st Sess. 20 (1983).

[13] Under Section 16(a), the use of physical force is "an element" if the offense necessarily entails such use; the statute need not provide, and the jury need not be instructed, that "the use of physical force" is an element of the offense. See *Chrzanoski* v. *Ashcroft*, 327 F.3d at 193 n.9 (assuming without deciding that this is so). If it were otherwise, the use of physical force would not be an element of (for example) the offense of "[a]ssault by striking, beating, or wounding," 18 U.S.C. 113(a)(4), a result that Congress obviously could not have intended, see S. Rep. No. 225, *supra*, at 307 (Section 16(a) covers threatened or attempted simple assault or battery). Cf. *Rutledge* v. *United States*, 517 U.S. 292, 297-300 (1996) (agreement is element of offense of continuing criminal enterprise, which requires proof that defendant acted "in concert" with others); *Ball* v. *United States*, 470 U.S. 856, 861-864 (1985) (possession of firearm is element of offense of receipt of firearm by felon, which requires proof that defendant "received" firearm). The briefs of petitioner and his amici do not suggest any disagreement with this view.

bodily injury when he crashes into the drunk driver's car. Pet. Br. 29; NACDL Br. 13. Petitioner and his amici apparently take the view that there has been no physical force in that situation because the drunk driver's car was motionless at the time of impact. Pet. Br. 29-30; NACDL Br. 13. Contrary to the contentions of petitioner and his amici, each of these examples does in fact entail the use of "physical force."

As a noun, "force" means "power, violence, compulsion, or constraint exerted upon or against a person or thing." *Webster's Third New International Dictionary*, *supra*, at 887. As a verb, "force" means "to constrain or compel by physical, moral, or intellectual means." *Ibid.* Accordingly, "physical force against the person or property of another," 18 U.S.C. 16(a), is the exertion of power, violence, compulsion, or constraint, by physical means, against (though not necessarily upon) a person or his property. It is to be distinguished from non-physical power or compulsion—for example, "moral suasion" or "the force of argument."

If a drunk driver swerves and thereby causes a pedestrian (or another driver) to jump (or swerve) out of the way to avoid being struck, the drunk driver is exerting power and compulsion against the victim. Force does not require a collision. See *Dickson* v. *Ashcroft*, 346 F.3d 44, 49-50 (2d Cir. 2003). Indeed, the conduct described by petitioner and his amici is routinely described as "forcing" a pedestrian or vehicle off the sidewalk or street. See, *e.g.*, *Edwards* v. *State*, 462 So.2d 581, 583 (Fla. Dist. Ct. App.), review denied, 475 So.2d 694 (Fla. 1985). And the conduct is carried



out by physical means: the propulsion of a machine weighing thousands of pounds.[14]

As for the drunk driver who stops his car on a highway or other well-traveled location where it should not be, he has placed a dangerous obstacle in the path of an unsuspecting driver whom he has caused to collide with the obstacle. Such a defendant has thereby exerted power, by physical means, against the victim. It would not make sense to say that the use of physical force includes hitting a person with an object but not placing the object where the person can be expected to hit it himself, particularly since a battery or murder could be carried out by either method.[15]

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[14] While the edition of *Black's Law Dictionary* that was current at the time of Section 16's enactment defined "physical force" as "[f]orce applied to the body," *Black's Law Dictionary*, *supra*, at 1032, the current edition correctly recognizes that the adjective "physical" refers to the means by which the force is exerted, not the object of its exertion, see *Black's Law Dictionary* 673 (8th ed. 2004) ("physical force" means "[f]orce consisting in a physical act").

[15] *Barrington* v. *State*, 199 So. 320 (Fla. 1940), the Supreme Court of Florida decision on which petitioner relies (Pet. Br. 29-30), does not support the view that a defendant of this type has not used physical force. In rejecting a sufficiency-of-the-evidence challenge to the conviction of a drunk driver whose victim collided with a car the defendant had parked on a highway, the court held that the defendant had caused death by the "operation" of his car because he had "left it an obstacle in the path of other automobiles" and had "placed it in such a position on the highway that it became a menace to moving traffic." 199 So. at 322-323. That apt description of the defendant's conduct is consistent with the view that he used physical force against his victim.

## II. PETITIONER'S VIOLATION OF FLA. STAT. ANN. § 316.193(3)(c)(2) IS ALSO A CRIME OF VIOLENCE UNDER 18 U.S.C. 16(b)

### A. By Its Nature, Drunk Driving Resulting In Injury Involves A Substantial Risk That Physical Force Against The Person Or Property Of Another May Be Used In The Course Of Committing The Offense

Wholly apart from Section 16(a), petitioner's offense is a crime of violence under Section 16(b). Subsection (b) defines "crime of violence" as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The Florida offense indisputably satisfies the "felony" requirement. See Fla. Stat. Ann. § 316.193(3)(c)(2). And even if a person could be said to use "physical force against the person or property of another" only when he drives into another vehicle, person, or thing, but see Point I.B, *supra*, the offense of drunk driving resulting in injury, "by its nature," involves "a substantial risk" of the use of such force "in the course of committing the offense." In every case in which a person not only drives under the influence but operates his vehicle in such a way that he causes "serious bodily injury"—defined by Florida statute as "a physical condition that creates a substantial risk of death, serious personal disfigurement, or protracted loss or impairment of the function of any bodily member or organ," Fla. Stat. Ann. § 316.1933(1)(b) (West Supp. 2004)—there is a "substantial risk" that the defendant will drive into another vehicle, person, or thing.

In the great majority of cases in which a person engages in the conduct prohibited by the Florida



statute, there is not merely a "substantial risk" that the defendant will drive into another vehicle, person, or thing; he will in fact have done so. That is the "typical" drunk-driving-with-injury offense, Pet. Br. 28, of which petitioner's is an example. In the few remaining cases—those in which a person causes serious bodily injury without actually driving into another vehicle, person, or thing—the drunk driver's conduct involves a substantial risk that there will be such a collision. Any defendant who not only drives drunk but also "swerves off the road, causing a pedestrian to dive into a ditch and become seriously injured," Pet. Br. 28, or has a "near miss [that] causes a heart attack," *ibid.*, or has his car struck after stopping it "in harm's way, for example, alongside a highway median or opposite oncoming traffic," NACDL Br. 13, is driving in such a way that there is a "substantial risk" that he will crash into another vehicle, person, or thing. Virtually by definition, a "near miss," Pet. Br. 28, involves a substantial risk of a hit.

Petitioner does not dispute this point, and his amici affirmatively concede it. See NACDL Br. 24 ("drunken driving entails a risk of injury-causing impact" and "this risk is clearly substantial in those cases where injury-causation is an element of the offense"). Their only objection to the view that petitioner's offense is a crime of violence under Section 16(b) is that the "use" of force of which there must be a substantial risk means the intentional use of force. See NACDL Br. 23-27. But there is no merit to that objection, for the same reasons that the "use" of force in Section 16(a) does not require volitional conduct. See Point I.A, *supra*.

**B. The Question Whether Drunk Driving Resulting In Injury Is A Crime Of Violence Under 18 U.S.C. 16(b) Is Properly Before The Court And Should Be Answered If The Court Determines That The Offense Is Not A Crime Of Violence Under 18 U.S.C. 16(a)**

In holding that the Florida offense of which petitioner was convicted is a crime of violence under 18 U.S.C. 16, both the BIA and the court of appeals followed the Eleventh Circuit's earlier decision in *Le*. J.A. 106-107, 117. *Le* held that the Florida offense is a crime of violence under Section 16(a), without reaching the question whether it is a crime of violence under Section 16(b). 196 F.3d at 1354. Petitioner has addressed the question whether Section 16(b) applies to the Florida offense, insofar as he contends that the meaning of "use" is the same in both subsections. See Pet. Br. 18-23. And while petitioner has not directly addressed the question whether the offense satisfies the "substantial risk" component of Section 16(b), cf. *id.* at 19 n.5, he has not suggested any impediment to this Court's resolution of the issue, see *id.* at 7. Petitioner's amici, however, contend that, because the issue was not addressed below, "this Court—in the event it agrees that [the] Florida [offense] does not fall within § 16(a)—should not itself evaluate in the first instance whether [the offense] is a 'crime of violence' under § 16(b)." NACDL Br. 21. Petitioner's amici are mistaken.

1. As an initial matter, there is no procedural bar to the Court's consideration of the issue. The question on which the Court granted certiorari is whether the Florida offense is a crime of violence "under 18 U.S.C. § 16," Pet. i, and whether it is a crime of violence under Section 16(b) is "fairly included therein," Sup. Ct. R. 14.1(a). In any event, a respondent "may rely upon any matter appearing in the record in support of the judgment below," *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982), and the type of crime that drunk driving resulting in injury is "by its nature," 18 U.S.C. 16(b), is a pure question of law that can necessarily be decided on the basis of the record in this case. The fact that the Section 16(b) argument was not raised in the court of appeals, especially given the Eleventh Circuit precedent "squarely h[o]ld[ing]" that the Florida offense is a crime of violence under Section 16(a), J.A. 117, does not prevent the Court from affirming on this alternative ground. See *Schweiker* v. *Hogan*, 457 U.S. 569, 585 n.24 (1982).



That there is no procedural bar to deciding the issue does not mean, of course, that the Court is obligated to do so. If it were to determine that the Florida offense is not a crime of violence under Section 16(a), the Court could decline to consider the applicability of Section 16(b) as a matter of discretion. But addressing the issue would be the better course, because the question whether an offense like the one at issue here is a crime of violence under Section 16(b) has divided the lower courts,[16] and that division would persist if the Court decided that the Florida offense is not a crime of violence under Section 16(a) and declined to consider whether it is a crime of violence under Section 16(b). This case therefore satisfies even the stringent stan-

[16] Compare *Bazan-Reyes* v. *INS*, 256 F.3d 600 (7th Cir. 2001) (Wisconsin offense of homicide by intoxicated use of vehicle is not crime of violence) and *United States* v. *Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001) (California crime of driving under the influence with injury to another is not crime of violence) with *Omar* v. *INS*, 298 F.3d 710 (8th Cir. 2002) (Minnesota crime of vehicular homicide is crime of violence).

dard suggested in *United States* v. *Nobles*, 422 U.S. 225 (1975): that, in the exercise of its discretion, the Court will consider "alternative grounds for affirmance" if "the issues are of sufficient general importance to justify the grant of certiorari." *Id.* at 242 n.15.

2. It is true, as petitioner's amici note, NACDL Br. 21 n.6, that, in its brief in opposition to the certiorari petition, the government said that "[t]he application of Section 16(b) to petitioner's Florida conviction is an issue that has not been addressed below and, accordingly, should not be reviewed by this Court," Br. in Opp. 8. The government made that statement, however, in the course of arguing that the Court should deny certiorari and await a case in which both subsections of 18 U.S.C. 16 had been addressed by the lower court. Br. in Opp. 7-9. In granting certiorari, the Court rejected the contention that this case was not a suitable vehicle for deciding whether drunk driving resulting in injury is a crime of violence under Section 16, and now that the case is here, the Court should address whatever issues are necessary to provide a definitive and comprehensive answer to that question.

The government also suggested in its brief in opposition that *INS* v. *Ventura*, 537 U.S. 12 (2002) (per curiam), might preclude the Court from deciding whether the Florida offense falls within Section 16(b). Br. in Opp. 8. On reflection, we do not believe that *Ventura* is an obstacle to review. *Ventura* held that the court of appeals, after reversing a BIA decision in favor of the government, should have remanded the case so that any further evidence and legal arguments that might support removal could be considered by the BIA in the first instance. The principle applied in *Ventura* —that "a court of appeals should remand a case to an agency for decision of a matter that statutes place



primarily in agency hands," 537 U.S. at 16—does not apply here, because, as the BIA itself acknowledged in this case, "the meaning of the term 'crime of violence' under 18 U.S.C. § 16 is a matter of federal criminal law" and the BIA therefore "defer[s] to circuit court interpretations" of Section 16, J.A. 107. Cf. *Crandon* v. *United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment) ("a criminal statute[] is not administered by any agency but by the courts"). See generally *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947) (rule of *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), is that reviewing court may not affirm administrative action on ground not relied upon by agency when court is "dealing with a determination or judgment which an administrative agency alone is authorized to make"). *Ventura* is particularly inapposite because the answer to the question whether the Florida offense is a crime of violence determines the court of appeals' jurisdiction. See J.A. 116 ("[I]f [petitioner] is an alien who is removable based on an aggravated felony conviction, [8 U.S.C.] § 1252(a)(2)(C) divests us of jurisdiction to review the removal order.").

### III. THE DEFINITION OF "SERIOUS CRIMINAL OFFENSE" IN 8 U.S.C. 1101(h) DOES NOT SUPPORT THE VIEW THAT THE STATUTORY OFFENSE OF DRUNK DRIVING RESULTING IN INJURY IS NOT A "CRIME OF VIOLENCE" UNDER 18 U.S.C. 16

Title 8 U.S.C. 1182(a) (2000 & Supp. I 2001) lists categories of aliens who are ineligible for visas and for admission to the United States. One such category is aliens who have asserted immunity from prosecution after being charged with the commission of a "serious criminal offense." 8 U.S.C. 1182(a)(2)(E). That term is defined in 8 U.S.C. 1101(h), which was added to Section

1101 in 1990. See Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, Pub. L. No. 101-246, § 131(b), 104 Stat. 31. Under Section 1101(h), a "serious criminal offense" means

> (1) any felony;
>
> (2) any crime of violence, as defined in section 16 of title 18; or
>
> (3) any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another.

Petitioner contends that this definition's inclusion of both "crime of violence" and drunk driving involving injury demonstrates that an offense like the one at issue here is not a crime of violence. Otherwise, he says, there would have been no reason to include Section 1101(h)(3). Pet. Br. 34-36. Accord NACDL Br. 20 n.5; MIHRC Br. 8-11. This contention is without merit.

As an initial matter, what petitioner is asking the Court to do, in essence, is to defer to what he contends is the 101st Congress's interpretation in 1990 of a statute passed by the 98th Congress in 1984. See Pet. Br. 35 ("as of February 1990, Congress believed that DUI offenses that cause injury are not within 'crimes of violence' defined in 18 U.S.C. § 16"). Even if the 101st Congress interpreted Section 16 as petitioner contends, "the opinion of this later Congress as to the meaning of a law enacted [more than five] years earlier does not control the issue," *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 839 (1988), because, as this Court has "often observed," the views of a later Congress "form a hazardous basis for inferring the intent of



an earlier one," *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 355 (1998) (quoting *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 348-349 (1963)). See, *e.g.*, *United States* v. *Texas*, 507 U.S. 529, 535 n.4 (1993); *Mackey*, 486 U.S. at 839-840 & n.15.

In any event, interpreting 18 U.S.C. 16 to include the Florida offense at issue here does not in fact render 8 U.S.C. 1101(h)(3) "superfluous," Pet. Br. 35; MIHRC Br. 9, or "wholly unnecessary," NACDL Br. 20 n.5. As explained below, if the Florida offense is a "crime of violence," and thus a "serious criminal offense" under both Section 1101(h)(2) and Section 1101(h)(3), there are still drunk-driving crimes, in Florida and elsewhere, that qualify as a "serious criminal offense" under Section 1101(h)(3) but not under Section 1101(h)(2).

Under subsection (h)(3), a "serious criminal offense" is any crime of driving while intoxicated or under the influence "if such crime involves personal injury to another." All that subsection (h)(3) requires is that the particular episode of drunk driving in fact involved personal injury to another. Unlike Section 16(a), it does not require that the statutory offense have personal injury to another "as an element"; and unlike Section 16(b), it does not require that the crime involve personal injury to another "by its nature." That the injury requirement is case-specific rather than categorical is confirmed by the fact that subsection (h)(3) is aimed at misdemeanors (since subsection (h)(1) covers "any felony") and the statutory offense of drunk driving with injury is ordinarily a felony in the States that have one. See note 4, *supra*.

Suppose, then, that a person commits the simple misdemeanor offense of "driving while intoxicated or under the influence of alcohol," and that, in that particular case, "such crime involves personal injury to

another." 8 U.S.C. 1101(h)(3). That person will have committed a "serious criminal offense" under Section 1101(h)(3). But he will not have committed a "crime of violence" under Section 16(a), because the offense does not have "as an element" the use, attempted use, or threatened use of physical force (even under the broadest possible understanding of those terms), and he will not have committed a "crime of violence" under Section 16(b), because (at a minimum) the offense is not "a felony." Accordingly, if the statutory offense of drunk driving resulting in injury is a crime of violence under Section 16, as the government contends, Section 1101(h)(3) is still necessary in order for the definition of "serious criminal offense" to capture the simple misdemeanor offense of drunk driving in cases in which the drunk driver causes injury. Such cases will arise when the crime occurs in a State that does not have a statutory offense of drunk driving resulting in injury and when it occurs in a State that does have such an offense but the defendant is charged with a lesser one.

Finally, even if the 101st Congress's view of the meaning of a statutory term enacted by the 98th Congress were relevant, and even if 8 U.S.C. 1101(h)(3) covered only the statutory offense of drunk driving resulting in injury, it still would not follow that 18 U.S.C. 16 should be interpreted to exclude that offense. Even under those circumstances, the 101st Congress might have enacted Section 1101(h)(3), not because it believed that Section 16 does not cover the offense of drunk driving with injury, but because it was uncertain whether courts would interpret the provision that way, and it wanted to be sure that the offense would be included in the definition of "serious criminal offense." Cf. *Mackey*, 486 U.S. at 839 (statute might have been amended, not because Congress thought statute as



originally enacted had a different meaning, but because Congress "thought that some courts had erroneously construed" it).

In this regard, it bears emphasis that there would be considerable overlap in Section 1101(h) even if petitioner's view were correct. Since subsection (h)(1) covers "any felony," a substantial proportion of crimes of violence under Section 16(a), and all crimes of violence under Section 16(b), are captured by both Section 1101(h)(1) and Section 1101(h)(2). And even if the felony offense of drunk driving resulting in injury were not a crime of violence, it would still be covered by both Section 1101(h)(1) and Section 1101(h)(3). It thus appears that, in enacting Section 1101(h), Congress was seeking to ensure that no serious criminal offense would slip through the cracks, even at the expense of redundancy.[17]

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[17] As additional support for their argument that drunk driving resulting in injury is not a crime of violence, petitioner's amici invoke the rule of lenity. NACDL Br. 27-28; CIEJ Br. 23-27. But they misstate the rule. It does not apply whenever there is "any ambiguity" in the language of a statute, NACDL Br. 27, much less whenever there is "any *possible* ambiguity," CIEJ Br. 27 (emphasis added). As this Court has emphasized, "[t]he simple existence of *some* statutory ambiguity * * * is not sufficient to warrant application of th[e] rule, for most statutes are ambiguous to some degree." *Muscarello* v. *United States*, 524 U.S. 125, 138 (1998) (emphasis added). If the law were otherwise, the rule would be tantamount to one that "automatically permits a defendant to win." *Id.* at 139. Instead, what is required is a "*grievous* ambiguity," such that, at the end of the interpretive process, the Court can still make "no more than a guess" as to what Congress intended. *Id.* at 138-139 (quoting *Staples* v. *United States*, 511 U.S. 600, 619 n.17 (1994), and *United States* v. *Wells*, 519 U.S. 482, 499 (1997); emphasis added). That standard is not satisfied here, and petitioner's amici do not suggest that it is.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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